UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

SHARON JEAN DAWSON v. CARR INVESTMENTS, INC., EDWARD F. CARR, JR., and JONATHAN WILLIAM LUBOW	CFTC DOCKET NO. 96-R101 OPINION AND ORDER

Respondents Carr Investments, Inc. ("Carr Investments"), Edward F. Carr, Jr. ("Carr"), and Jonathan William Lubow ("Lubow") appeal from the decision of an Administrative Law Judge ("ALJ") granting complainant Sharon Jean Dawson ("Dawson") a reparations award of $519,935.66 plus interest and costs. Respondents raise procedural, factual, and legal challenges to the ALJ's decision. Dawson opposes the appeal and urges us to affirm the ALJ's award.

As explained below, we conclude that the ALJ erred by failing to assess the reliability of Dawson's testimony in light of the record as a whole. Based on our independent view of the record, we dismiss Dawson's claims against Lubow for a failure of proof. As for Carr Investments and Carr, we conclude that the weight of the evidence shows that they proximately caused Dawson $42,435.66 in damages by fraudulently inducing her to open a commodities account. We award Dawson this amount, plus interest and costs, and dismiss the remainder of her claims against Carr Investments and Carr for a failure of proof.

BACKGROUND

I.

Many of the facts material to Dawson's claims are essentially undisputed. Dawson is a California resident who holds a Bachelor of Arts degree in dramatic arts, with postgraduate degrees in special education and the sociology of deafness. In 1993, when Dawson opened her commodities account, she was 41 years old and worked, on a part-time basis, as a substitute teacher for hearing-impaired students. Dawson suffers from a severe congenital hearing loss.

During the period at issue, Carr Investments was an independent introducing broker ("IB") based in Madison, New Jersey.[1] Carr served as the president of Carr Investments. Lubow was an employee of the firm.[2]

In July 1991, Dawson's husband, Peter Stimson Brooks ("Brooks"), opened an individual trading account with Rodman & Renshaw, Inc. ("Rodman & Renshaw") through Carr Investments.[3] Brooks deposited $40,000 and granted Carr discretion to trade the account. Most of the trades in the account involved writing (*i.e.*, selling) exchange-traded commodity options. By May 1992, the account's liquidation value had fallen to $197, largely due to substantial withdrawals by Brooks. Brooks then deposited an additional $129,051, but by September 30, 1992, the account's liquidation value had fallen to $68,760. Monthly activity statements prepared by Rodman & Renshaw indicate

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[1] Carr Investments ceased doing business and withdrew from registration with the National Futures Association ("NFA") two years after the complaint in this proceeding was filed.

[2] Both Carr and Lubow were registered as associated persons ("APs") of Carr Investments.

[3] Rodman & Renshaw was registered as a futures commission merchant ("FCM") during the time at issue. As discussed below, Dawson named Rodman & Renshaw as a respondent in this proceeding. Prior to the hearing on Dawson's claims, however, the ALJ dismissed the complaint against the firm when it became the subject of a bankruptcy proceeding.

that the account lost $3,688 in July 1992, $4,266 in August 1992, and $12,199 in September 1992.[4]

On October 22, 1992, Carr wrote Dawson a letter outlining "a proposal for establishing a systematic trading account."[5] Complainant's Exhibit 5. Carr's letter suggested that Dawson fund the account "with approximately one million dollars" and purchase "ten, one hundred thousand dollar U.S. government backed 120 day Treasury Bills." *Id*. As proposed by Carr's letter, in addition to earning interest on the Treasury bills, Dawson's account could make profits through the sale of commodity options:

> Utilizing our system that recognizes opportunities in exchange traded options, we will search for overvalued options to write and collect premium. We look to capitalize on the statistical fact that a great deal of options expire worthless, thus creating wealth for the option seller. There are no guarantees and past performance is not indicative of future results but I am confident that we could generate a return between 18 and 23 percent per year for your account. The compounded growth of the Treasury bill[s] will help enhance our profit objective. If these returns (which are not guaranteed) are realized, you will be able to withdraw a minimum of $10,000 per month without depleting the principal amount.[6]

Id.

Although Dawson did not respond to Carr's letter, she subsequently agreed to a personal meeting with Carr and Lubow. The two men traveled to California in early 1993. The day after they arrived, Carr and Lubow breakfasted with Brooks and then had a working lunch with Brooks and Dawson. The following day, Carr met with Dawson alone, while Lubow and Brooks played golf.

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[4] Unless otherwise indicated, we have rounded off all monetary amounts to the nearest dollar.

[5] Carr mailed a separate copy of this letter to Brooks.

[6] Carr's letter to Dawson also indicated that he was willing to coordinate his activities with Dawson's "asset management team" at the Wells Fargo Bank in San Francisco, where she kept the bulk of her assets, including a $1.2 million inheritance she received from her father in December 1992.

On March 8, 1993, Dawson signed account-opening documents establishing a joint account at Rodman & Renshaw in her and her husband's names.[7] She granted Brooks, Carr, and Lubow discretion to enter trades for the joint account.[8] On March 31, 1993, she transferred $200,000 from her account at the Wells Fargo Bank into the joint account. Carr used some of these funds to buy $180,000 worth of Treasury bills and began trading with the remainder. Most of Carr's initial transactions were options sales, which generated $37,285 in premiums by the end of May 1993.[9]

Soon after Carr began trading the joint account, Dawson began withdrawing funds. Account records indicate that Rodman & Renshaw sent checks to Dawson on April 21, 1993 ($5,000), May 10, 1993 ($5,000), May 20, 1993 ($2,000), and June 1, 1993 ($5,000).

In June 1993, Carr received a "letter of authorization" from Dawson, which was dated May 27, 1993. Respondents' Exhibit 3. It directed that $100,000 be transferred "from [Dawson's] account number 245 24562 into [her] husband's account at Carr Investments number 245 24528." *Id.* The letter explained that Dawson was authorizing the transfer "to partially repay [her] husband for his financial and [monetary] assistance dating from 1985." *Id.* Carr noticed that Dawson's signature looked as if it had been

[7] These documents included a Rodman & Renshaw customer agreement, the risk disclosure statement mandated by Commission Rule 1.55, and a written acknowledgement that Dawson received and reviewed a separate options risk disclosure statement prepared by Rodman & Renshaw.

[8] About a month later, Dawson executed a revised power of attorney granting Carr sole discretion over the trading in the joint account. The revised power of attorney provided that Carr's trading decisions would be "subject to approval by [the] client or Peter S. Brooks." Respondents' Exhibit 2.

[9] The joint account's monthly activity statement for May 1993 indicates that the account was short 54 options, including exchange-traded puts and calls on lumber, silver, sugar, unleaded gasoline, and cotton futures. The account was also long 10 heating oil call options, and had open long futures positions in silver (3 contracts) and the U.S. Dollar Index (2 contracts).

rubber-stamped, and Rodman & Renshaw officials declined to transfer funds based on the letter's instructions.

On June 21, 1993, Dawson deposited an additional $90,735.66 into the joint account. Four days later, on June 25,1993, she signed a letter to Carr authorizing Rodman & Renshaw (1) to transfer between $2,000 and $5,000 each month from the joint account to Dawson's account at the Wells Fargo Bank and (2) to transfer up to $10,000 a month from the joint account to Brooks's individual trading account, at Brooks's request. Respondents' Exhibit 3. In accordance with these instructions, Rodman & Renshaw began making transfers to Brooks's account the following month.

During the year 1993, trading in the joint account was generally successful. In a letter dated December 3, 1993, Carr advised Brooks that after factoring in disbursements of $64,300, the joint account had "a current balance of approximately $300,000, a return in excess of 32% in [the past] eight months."[10] Complainant's Exhibit 12. Carr suggested these positive results "warrant[ed] qualified referrals" from Brooks. *Id*. To "enhance a mutually beneficial relationship" between the two men, Carr promised to pay Brooks "at a rate of 1.5% for every new account dollar invested with Carr Investments as a result of [Brooks's] efforts." *Id*.

The following month, Carr received a $100,000 check, dated January 11, 1994, which was drawn on Dawson's account at the Wells Fargo Bank and made payable to her. Respondents' Exhibit 7. Under Dawson's handwritten endorsement on the back of the check was a typed instruction to deposit the $100,000 into "Account No. 24528," *i.e.*, Brooks's individual trading account. *Id*. Carr also received a typewritten letter signed by

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[10] The joint account's monthly activity statement for December 1993 shows that the month-end liquidation value was $307,537, including $200,000 in Treasury bills.

Dawson and dated January 15, 1994, telling him that her $100,000 check was intended for "deposit into account #24528" and also that she and Brooks were "looking forward to increasing our T-bill accounts with Carr Investments." *Id*. In accordance with these written instructions, Rodman & Renshaw deposited the $100,000 check into Brooks's account.[11]

Carr received three similar $100,000 checks from Dawson in March 1994, along with a letter, dated March 30, 1994, which was signed by Dawson. Respondents' Exhibit 9. The text of the letter was virtually identical to Dawson's January 15, 1994 letter to Carr. *Id*. Consistent with the instructions from Dawson, Rodman & Renshaw deposited her three $100,000 checks into Brooks's individual trading account.

From January 1994 through April 1994, the joint account realized gains of more than $459,000. In May 1994, however, the joint account's liquidation value fell to $31,752. The account's 1099-B tax form for 1994 states that futures trading in the joint account resulted in realized profits of $111,164 in May 1994, but that options trading that month realized $463,384 in losses. The joint account's monthly activity statement for May 1994 suggests that the bulk of these losses occurred when Carr bought options on July 1994 coffee futures contracts to close out existing short positions.[12]

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[11] The liquidation value of Brooks's account had fallen to $3,123 by the time Dawson's January 11, 1994 check was deposited. In a hand-written note to Carr, dated January 12, 1994, Brooks explained Dawson's decision to deposit $100,000 of her funds into his account as the product of an agreement "to pay [Brooks] back after [he] paid all the bills for 12 years." Respondents' Exhibit 7. Along with his note, Brooks enclosed a "long-awaited list of personal referrals" and asked Carr to "call [him] first so [he could] go over them with you and [Lubow]." *Id*. The record does not indicate whether these referrals generated any business for Carr Investments or whether Carr paid any rebates to Brooks.

[12] Trading records show the joint account lost more than $231,000 when 27 short call option contracts were liquidated on May 16, 1994, and lost an additional $96,315 on the liquidation of a 13-contract option short call position on May 24, 1994.

The downslide continued in June, when the joint account suffered realized losses of $82,914 in futures and $181,056 in options. By the end of June 1994, the account's liquidation value had improved to $61,063. During the remaining six months of 1994, the liquidation value rose as high as $78,758 (in July) before steadily declining to $46,112 at year's end. Around that time, Carr instructed Lubow to begin taping all telephone conversations with Brooks.

In a telephone call recorded on May 16, 1995, Lubow informed Brooks that Dawson had asked to withdraw $3,400 from the joint account. In response, Brooks commented that the withdrawal "doesn't leave much I bet."[13] Complainant's Exhibit 18. The following day, the account suffered substantial losses on the liquidation of two open positions in July cotton call options. These transactions reduced the joint account's cash balance to $4,395. When Lubow told Brooks about the trades, Brooks agreed that they had to be done to avoid bringing the account "into a negative balance." Complainant's Exhibit 17.

A week later, on May 23, 1995, Dawson sent Carr and Lubow a one-page fax, asking them to send her $1,500 to "help a friend with car trouble." Respondents' Exhibit 6. The funds were wired to her on May 24, 1995, the day on which Lubow liquidated the last open position remaining in the joint account. At the end of the month, the account had a cash balance of $2,668.

On July 11, 1995, Brooks called Lubow to alert him that Dawson might be withdrawing $1,800 from the joint account "to buy a second horse so her friend can go trail riding with her." Complainant's Exhibit 24. In response, Lubow told Brooks that

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[13] Daily activity statements indicate that the withdrawal reduced the joint account's cash balance to $11,942.

"all she's got liquid" was $1,667.55. *Id*. Three weeks later, Dawson sent Carr a fax, dated July 31, 1995, asking that her normal monthly payment of $3,000 be increased by $500:

> Yes, Peter [*i.e.*, Brooks] explained to me what was going on with the account. I understand that we are having to be careful, as we are not in the growth phase, because of weather in the Midwest, which has been weird this year, so, I am being careful. Doing my best to stay within budget. I was wondering, when you send my monthly allotment, I think I need an extra five hundred dollars, bringing the total to $3,500. For some reason, my bank account is overdrawn. I assume it is because there were some service charges to my account, due to overdraft protection, and also some checks made to me by Peter were returned, and, of course, I got stuck with the service charges. I believe that should clear it up and from then on, back to the old bean counting.

See Respondents' Exhibit 10. Due to the lack of funds, Carr was unable to fulfill Dawson's request. On July 31, 1995, Brooks withdrew $3,000 from his individual trading account.

Six weeks later, in a call recorded on September 14, 1995, Carr agreed to loan Brooks $3,000 so Dawson could receive her expected monthly allotment by the first of October. Complainant's Exhibit 25. Using an overnight mail service, Carr sent Brooks a $3,000 check. Complainant's Exhibit 27. Along with the check, he sent a release covering "any and all claims relating to all activity in accounts maintained by [Dawson and Brooks] with Carr Investments." Complainant's Exhibit 26. Brooks was supposed to sign twice, once for himself and once for Dawson, as her "attorney-in-fact." *Id*.

In a telephone call recorded the following day, September 15, 1995, Carr stressed the need for Brooks to release any claims that Dawson might have against him and his firm: "There's two signatures, both of which [are] for you to sign. One on your behalf

and one [on] Sharon's behalf and I have to get it, Peter." Complainant's Exhibit 25. When Brooks suggested that Dawson would be upset when she reviewed the release, Carr said, "Well she doesn't have to. The whole purpose is for you to sign it." *Id*. Despite Carr's urging, Brooks never signed the proposed release.

There matters stood until November 9, 1995, when Carr received a handwritten letter from Dawson. In her letter, Dawson told Carr that she was "glad the funds came in" and was sorry that Carr "had so much trouble with [his] computer and comptroller." In addition, she asked that Carr send her $3,640 to pay property taxes and instructed him to "have [Brooks's] name taken off [Dawson's] account." Respondents' Exhibit 11. The letter explained that Dawson preferred "that Peter not have access to my [account] at all" and advised Carr that, in the future, Dawson wanted Carr "to communicate [with] me." *Id*.

Carr responded to Dawson in writing the following day. His one-page letter expressed surprise over Dawson's reference to the receipt of funds from the joint account. It noted that Carr Investments had not experienced any computer problems and did not employ a comptroller. Respondents' Exhibit 11. The letter advised Dawson that the "current balance of your account is $27.55" and added that Carr hoped that "Peter has kept you well informed." *Id*. Lastly, it advised Dawson that before Brooks's name could be removed from the joint account, Dawson would have to obtain his written consent. *Id*.

Carr sent his letter by certified mail, return receipt requested, with delivery restricted to Dawson. The package was returned to Carr unopened, with a notation that delivery had been refused. Carr had no further communications with Dawson until December 5, 1995, when she called him to ask about the status of her request for funds to

pay taxes. In the taped-recorded conversation that followed, Carr told Dawson that there were "no dollars left" in the joint account or Brooks's individual account. He explained that "over $250,000 . . . was transferred from your account." Complainant's Exhibit 15; Respondents' Exhibit 21. When Dawson asked him into whose account the funds were moved, Carr replied, "Some into Peter's and some into your Wells Fargo." *Id*.

Carr also told Dawson that the transfers were made in accordance with a letter of authorization signed by Dawson on June 25, 1993. He explained that from "the first time Peter said I want you to wire money from Sharon's account to my account," Carr had insisted on obtaining Dawson's signature. In Carr's words, "We said, Peter . . . it's a joint account [so] we can do that but to make things safe, let's get a signature. If we get it in writing, we'll always have it on file and sure enough we got it in writing with a signature." *Id*. Carr then told Dawson about the May 27, 1993 letter requesting the $100,000 transfer from the joint account to Brooks's account: "Compliance [officials at Rodman & Renshaw] rejected this because it looked like a rubber stamped signature. Or I guess that is the reason . . . because that is what it looked like to me." *Id*.

In addition to discussing the fund transfers, Carr told Dawson that the joint account had suffered "significant losses." He blamed these losses on Brooks as well as himself: "Peter was calling some of the trades that did not work out well. We called trades that did not work out well." *Id*. Carr explained that the Treasury bills Dawson thought she owned "were broken or mature" and no longer available to her. When Dawson asked him, "[h]ow many T-bills did I start out with," Carr responded only by saying that "[he] was honoring two signatures." *Id*.

During their conversation, Dawson denied that she ever authorized the monthly transfer of funds from the joint account to Brooks's account. She said she was unaware of the May 27, 1993 and the June 25, 1993 letters authorizing the transfer of funds from the joint account to Brooks's account. She told Carr that based on information that had been provided to her by Brooks, "I have six T-bills and I am suppose[d] to be earning . . . $3,000 a month income." *Id*. Describing Brooks as a thief, Dawson added: "I just had a very uncomfortable feeling about having his name listed on my account because I think it means he gets into a honey pot." She insisted that Brooks was only supposed to "make sure that the trades were good, [so] that I would earn my interest, you know, to pay my bills and then do the option thing." *Id*.

At the end of their conversation, Carr and Dawson agreed that Carr would send his November 10, 1995 letter a second time, along with a copy of the June 25, 1993 letter directing that up to $10,000 a month be transferred from the joint account to Brooks's individual trading account.

II.

In May 1996, Dawson and Brooks, acting *pro se*, submitted a joint reparations complaint against Carr Investments, Rodman & Renshaw, Carr, and Lubow. At the same time, Brooks individually submitted a separate complaint against the same respondents. Except for the amount of the losses alleged, the complaints were identical. The following month, Brooks and Dawson submitted amended versions of both complaints in response to substantive concerns raised by the Commission's Office of Proceedings ("Proceedings").

After Proceedings officials identified additional problems with the amended complaints, Dawson submitted a substitute complaint, which was filed in her name only and sought $627,400 in damages for alleged violations of Sections 4b and 4c(b) of the Commodity Exchange Act ("Act").[14] Dawson's substitute complaint, received by Proceedings on July 18, 1996, presented two principal theories of liability. First, it alleged that respondents fraudulently induced Dawson to open a commodity account by falsely representing that all of her funds would be invested in Treasury bills and that only a portion of the accrued interest would then be used for "riskier yet conservative" futures and options trades.[15] In this regard, the complaint specifically charged that respondents' solicitation did not include any discussion of "the risk inherent in [futures and options] trading."

Second, Dawson's substitute complaint alleged that once the joint account was opened, the respondents engaged in unauthorized trading. More specifically, it claimed that in May 1994, Brooks "directed respondents to discontinue placing trades" in the joint account. According to the complaint, rather than follow these instructions, respondents "engaged in a pattern of excessive and aggressive trading in [the joint] account, including purchases of coffee futures and/or options."

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[14] On the same day that Dawson filed her substitute complaint, Brooks amended his individual complaint a second time. Brooks's second amended complaint sought a reparations award of $453,000, an amount that equaled the equity in Brooks's individual trading account at Rodman & Renshaw in May 1994.

[15] According to the complaint, these trades were supposed to have been made "only after the monthly return of from $2,000 to $5,000 from [Dawson's] account and the inter-account transfer of $10,000 per month upon the request of her husband."

Proceedings forwarded Dawson's substitute complaint on July 23, 1996.[16] Carr Investments, Carr, and Lubow filed a joint answer generally denying Dawson's allegations. As to the fraudulent inducement claim, they insisted that Dawson had been advised of the risks involved in futures and options trading, and noted that she decided to open an account even though Brooks had previously sustained losses in his own account. They also denied trading the joint account in an unauthorized manner. In support of their position, they claimed that Brooks had not instructed that trading cease in May 1994, and also claimed that their daily telephone conversations with Brooks kept him fully apprised of the trading activities in the joint account.[17]

III.

In October 1996, Proceedings officials assigned the proceedings on both Dawson's and Brooks's complaints to the same ALJ. Soon thereafter, a San Francisco attorney appeared as counsel for Dawson and Brooks in their respective cases. The ALJ treated the two proceedings as related, imposing the same or similar deadlines in each and scheduling back-to-back evidentiary hearings in California. In September 1997, two weeks before those hearings were set to begin, the ALJ issued an order canceling both. The ALJ explained that he had reviewed transcripts of Carr's recorded telephone conversations with Dawson and Brooks in December 1995 and believed that they suggested a "serious conflict of interest" between Dawson and her husband. As a consequence, the ALJ ordered the attorney for Dawson and Brooks to consider whether he could continue representing both clients.

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[16] At the same time, Proceedings separately forwarded to respondents a copy of the second amended complaint submitted by Brooks in his own reparations proceeding against them.

[17] Rodman & Renshaw filed a separate answer denying it had engaged in any wrongdoing. It elected the formal decisional process described in Commission Rule 12.2 and paid the required fee.

In response to the ALJ's concerns, the attorney decided to withdraw as Dawson's counsel but continue representing Brooks in his reparations case. Dawson retained a new attorney, who entered her appearance in this proceeding on November 25, 1997. With the ALJ's approval, Dawson's newly retained counsel filed an amended complaint on January 5, 1998.

Dawson's amended complaint reiterated her prior claim that respondents defrauded her both by failing to disclose the "high risk inherent in [futures and options] markets" and by using her principal for commodity trading rather than the purchase of Treasury bills. The amended complaint, however, omitted Dawson's prior claim that beginning in May 1994, respondents traded the joint account in an unauthorized manner.

The amended complaint raised two new theories of liability. First, it charged that Carr breached a fiduciary duty by failing to notify Dawson about his concern over the authenticity of her signature on the May 27, 1993 letter authorizing the transfer of $100,000 from the joint account to Brooks's individual account. According to the complaint, if Carr had spoken with Dawson directly, she would have closed the joint account and returned all of her funds to the Wells Fargo Bank.

The amended complaint also charged that respondents committed a similar breach of fiduciary duty in 1994. In support, it alleged that in March 1994, Dawson told Carr that she was about to deposit $300,000 into the joint account. According to the amended complaint, before Dawson mailed her three $100,000 checks to Carr, Brooks surreptitiously wrote his own account number under her endorsement. The complaint charged that when Carr received the checks endorsed by Dawson for deposit in Brooks's individual account, he should have notified her before taking further action. Instead, he

and Brooks allegedly "relied on each other to remain silent [about the diversion of Dawson's checks into Brooks's account], and to lull [her] into believing that her account was being managed according to her instructions, so that the deception and conversion of money could continue."[18] On this basis, the complaint contended that Carr's failure to follow up on his conversation with Dawson constituted fraud, breach of fiduciary duty, and other related violations.[19]

In their joint answer to the amended complaint, Carr Investments, Carr, and Lubow continued to assert that they provided Dawson with appropriate risk disclosure and never promised that her funds would be used only to purchase Treasury bills. In response to Dawson's new allegations, the answer specifically averred that Carr had discussed his concerns about the May 27, 1993 letter with Dawson. It also specifically denied that Dawson had informed Carr in March 1994 that she was going to deposit $300,000 in the joint account for the purchase of Treasury bills.

Finally, respondents' answer raised several affirmative defenses, including the statute of limitations. In support of that defense, respondents argued that Dawson's new

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[18] After the amended complaint was filed, respondents served on Dawson a number of supplemental written interrogatories, one of which asked her to describe all her communications with respondents prior to the commencement of trading. Consistent with her allegations in the amended complaint, Dawson's response, filed on March 9, 1998, claimed that in April 1993, when she told Carr about her decision to give him sole discretionary trading authority over the joint account, she also informed him that

> if [Carr] handled her account as promised, he would earn her trust and she would deposit the additional $300,000 after one year. Throughout the time that her account was active, Ms. Dawson spoke with Carr over the telephone, and they exchanged cards and notes. In March 1994, Ms. Dawson again spoke with Carr who stated that everything was fine in her account. As promised, Ms. Dawson told Carr that she would wire transfer the remaining $300,000 from the Wells Fargo Bank to Rodman & Renshaw, as she had done to open the account.

[19] Dawson's amended complaint sought $500,000 in damages. In May 1998, the ALJ granted Dawson's motion to revise her damage claim to $690,735.66, representing the $290,735.66 deposited into Dawson's and Brooks's joint account and the $400,000 deposited into Brooks's individual trading account in January and March of 1994.

claims were untimely, since they had not been raised within two years of the December 5, 1995 accrual of Dawson's causes of action.

IV.

On April 2, 1998, the ALJ issued an order scheduling back-to-back hearings in the Dawson and Brooks proceedings for June 1998. Four days later, Brooks's attorney requested that the hearing in the Brooks case be adjourned until after August 9, 1998, because his client was in jail due to a misdemeanor spousal abuse conviction. In response, the ALJ cancelled the hearing in the Brooks matter, but ordered that the hearing in the Dawson case commence, as scheduled, on June 8, 1998.[20]

Carr, Lubow, Dawson, and Douglas Campbell, an expert witness for Dawson, testified during the two-day hearing in San Francisco.[21] Consistent with the parties' pleadings, Dawson and respondents presented markedly different versions of the core events at issue.

Dawson's Version

Dawson testified that in September 1992, she and Brooks learned she had inherited $1.2 million worth of General Motors stock from her father. (Tr. at 214.) According to Dawson, she met Carr and Lubow several weeks later, in October 1992, at a dinner arranged by Brooks. (Tr. at 216.) At that time, Dawson told Carr that she "was coming into some money, and . . . looking for a very slow, safe conservative way to

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[20] Respondents immediately moved to adjourn this proceeding until back-to-back hearings could be rescheduled. The ALJ denied the motion, but advised respondents that they "may, if so motivated, endeavor to have Mr. Brooks appear as a witness with permission of the court that has ordered his incarceration."

[21] Brooks did not testify during the hearing in his wife's case. Although Dawson and respondents both listed Brooks as a prospective witness in their prehearing memoranda, neither side sought to subpoena his appearance as a witness.

Prior to the hearing, the ALJ dismissed Rodman & Renshaw as a respondent because it was subject to a bankruptcy proceeding. *See* Commission Rule 12.24(d).

handle [it]." (Tr. at 219.) She cautioned Carr that since the money was her inheritance, "it would have to last [her] the rest of [her] life." *Id*. When Dawson explained that her money was to be invested in Treasury bills and Carr was to "work only with the interest," Carr assured her that he "understood completely" and would employ a "conservative approach" in handling her funds. *Id*.

According to Dawson, following this meeting, she received Carr's October 22, 1992 solicitation letter. (Tr. at 221.) Dawson did not open an account at that time, however, because her father's estate had not yet been distributed. *Id*. According to Dawson, she met with Carr a second time at "the beginning of February of 1993." (Tr. at 224.) She and Brooks had lunch with Carr and Lubow at a local restaurant. (Tr. at 225.) Although the lunch was "basically . . . a social meeting," the following day Dawson and Carr met alone. (Tr. at 227.) At the close of their one-on-one meeting, Dawson purportedly told Carr that, although she was a "little bit reluctant," she had decided to open a "small account" for $200,000. (Tr. at 229.) As Dawson recalled it, she also told Carr that if he "[was] doing well with the account . . . and if everything [was] going to plan," she would give him "some more over time." *Id*.

At the hearing, Dawson stated that she went along with Brooks's suggestion that she make him a joint account holder because he already had a rapport with Carr and Dawson liked to sleep late. (Tr. at 236, 317.) Dawson told Carr that she wanted to use Brooks as "[her] instrument of communication" with respondents (Tr. at 285), but insisted that "it was not [her] intention to share this money with Peter Brooks." (Tr. at 243.) As Dawson viewed it, the money in the joint account belonged solely to her: "It

was my money. I . . . told Ed Carr from the very beginning that it was my account."[22] (Tr. at 272.)

Dawson testified that she did not receive account-opening documents until a month after their February 1993 meeting. (Tr. at 230.) She conceded that she did not read the risk disclosure form included in those documents. (Tr. at 233.) According to her testimony, Dawson concluded that the disclosure statement would not apply to the joint account, since she had "discussed with Ed Carr what [her] specifics were" and had told him "if anything goes wrong, . . . [to] let me know in layman's terms exactly what's going on." *Id.*

Dawson testified that when she transferred $200,000 from her Wells Fargo bank account to the newly opened joint account on March 31, 1993, she "believed [Carr] was going to purchase T-bills." (Tr. at 233.) According to her testimony, Dawson was unaware that her Treasury bills would be subject to the risk of loss. (Tr. at 234.) Dawson also recalled that in June 1993, when she mailed Carr her check depositing an additional $90,735.66 in the joint account, she called him and explained that she was making the deposit "to get close to getting a third T-bill." (Tr. at 250.)

At the hearing, Dawson insisted that she placed similar telephone calls to Carr before she sent him her four $100,000 checks in January 1994 and March 1994. (Tr. at 254, 256.) She testified that she specifically instructed Carr to deposit the incoming checks in the joint account. According to Dawson, only later did she learn that Brooks

[22] According to Dawson, the same considerations led her to revoke the original power of attorney giving Brooks, Carr, and Lubow discretionary authority over the joint account. Because Dawson "did not want [Brooks] to handle [her] account," she executed a new power of attorney granting Carr sole discretion over trading in the joint account. Dawson testified that when she changed the power of attorney, she called Carr and told him that she "didn't trust Peter" and "just want[ed Carr] to handle [her] account." (Tr. at 240, 241.)

had typed his own account number under her signature.[23] Moreover, Dawson testified that, in March 1994, when she called Carr to tell him that she was sending him an additional $300,000, Dawson believed that "at that time, [she] would have, altogether, six T-bills." (Tr. at 256.) When she asked Carr if that was so, he purportedly said, "Yep." *Id*.

On cross-examination, Dawson admitted she had signed the January 15 and March 30, 1994 letters directing Carr to deposit her four $100,000 checks into Brook's individual trading account. (Tr. at 341.) She insisted, though, that Brooks had typed both letters and then instructed her to sign. (Tr. at 343.) According to Dawson, she did not realize that the account number referenced in the two letters was the number for Brooks's individual account, rather than the joint account.[24] *Id*.

Carr's Version

Carr testified that his October 22, 1992 letter outlining a proposal for a "systematic trading account" was his initial contact with Dawson. He claimed that

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[23] Dawson claimed that in "preparing for this case, I finally was able to get [Brooks] to confess that he surreptitiously put his account number on my checks." (Tr. at 257.) According to Dawson, this confession took place in the office of an unnamed attorney. (Tr. at 277.)

[24] At the hearing, Dawson did not testify about the transfers Rodman & Renshaw made from the joint account to Brooks's individual trading account based on the June 25, 1993 letter of authorization bearing her signature. The record, however, reflects unexplained conflicts in Dawson's recollection of facts material to those transfers. In the transcript of her December 5, 1995 telephone conversation with Carr, Dawson denied authorizing any monthly transfer of funds to Brooks's account. The substitute complaint filed by Dawson in July 1996, though, stated that Carr could use the interest accrued on the Treasury bills in the joint account for trading purposes "only after . . . the inter-account transfer of $10,000 per month upon the request of [Brooks]." Similarly, in discovery responses filed on December 30, 1996, Dawson stated that she "may have" authorized monthly transfers to Brooks's account, but claimed she did not have a copy of the letter of authorization. Although Dawson's January 1998 amended complaint did not mention the transfers, her March 1998 discovery responses claimed that when she signed the June 25, 1993 letter of authorization, it only directed Rodman & Renshaw to transfer $2,000 to $5,000 a month from the joint account to Dawson's Wells Fargo bank account. According to Dawson's discovery response, Brooks then altered the letter to authorize monthly transfers from the joint account to his individual trading account. Making the same argument, Dawson claimed in her posthearing brief that the monthly transfers to Brooks's individual account were not authorized, and requested that the full amount of the transferred funds ($75,500) be included in her damage award.

Brooks suggested this approach and told Carr to "'[m]ake something based on one million dollars, if you could send it out.'" (Tr. at 79.)

Carr testified that he and Lubow traveled to California to meet Dawson in March 1993.[25] (Tr. at 522.) According to Carr, he and Dawson talked about "the markets in general" and the risks of trading options, *i.e.*, "what would have to happen for things to go wrong, [and] what would have to happen for things to go right." (Tr. at 89.) Carr claimed that when he explained his strategy of selling exchange-traded options to her, he warned Dawson that she "potentially" would be exposed to "unlimited risk" if the price of the underlying commodity were to move against her position. (Tr. at 91.) Carr testified that he described the purchase of Treasury bills as a "form of escrow" or "good-faith money." (Tr. at 533.) Carr insisted that he did not discuss the October 22, 1992 letter with Dawson during their meeting.[26] (Tr. at 186, 534.)

According to Carr, Dawson's "stated objectives were to trade a commodities account and get a better return than she could at Wells Fargo." (Tr. at 123.) Carr testified that the only financial information that Brooks disclosed about Dawson was "that Sharon had General Motors stock." (Tr. at 86.) Carr said that "[he] didn't know anything about it being an inheritance." (Tr. at 539.)

Carr claimed that he recommended that Dawson open a joint account with Brooks. He explained to Dawson that by opening a joint account, a married couple could ensure that if the husband or wife died, the surviving spouse would receive the remaining

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[25] To corroborate this testimony, respondents introduced into evidence a receipt showing that they stayed at the Red Lion Hotel in Rohnert Park, California, on the nights of March 4 and 5, 1993. *See* Respondents' Exhibit 33.

[26] On cross-examination, Carr was asked where his October 22, 1992 letter to Dawson mentioned the risk of loss. In response, he pointed to language advising Dawson that "[t]here are no guarantees" she would earn a profit. (Tr. at 85.) Carr conceded, however, that the same language could have suggested that the "account will just stay status quo." *Id*.

assets “without having to go through probate.” (Tr. at 536.) In response to questions from Dawson’s counsel, however, Carr insisted that once Dawson decided to open a joint account, he had “no idea” if the funds deposited into it were “all hers or all Peter’s.” (Tr. at 121.)

At the hearing, Carr stated that he had questioned the authenticity of Dawson’s signature on the May 27, 1993 letter authorizing the transfer of $100,000 from the joint account to Brooks’s individual account. Upon receipt of the letter, Carr concluded that Dawson’s signature “could be a stamp” and discussed the matter with compliance officials at Rodman & Renshaw. (Tr. at 116.) As he recalled it, Carr told the officials that Dawson’s signature “doesn’t look kosher” and suggested it would be a good idea to “get it notarized.” (Tr. at 117.) Despite these misgivings, Carr admitted that he did not alert Dawson to the possible forgery of her signature. (Tr. at 117, 122.) Asked why not, Carr said, “Sharon wanted everything to go to Peter.”[27] (Tr. at 122.)

Carr testified that he talked to Dawson a total of “two or three times” while he was managing the joint account. (Tr. at 106.) He denied that Dawson called him to discuss the $100,000 check she mailed to Carr in January 1994 for deposit into Brooks’s

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[27] Carr insisted he was under no obligation to update Dawson on the status of the joint account, since he was in daily contact with the other joint account holder, Brooks. (Tr. at 104.) Thus, Carr told Brooks, but not Dawson, about his decision to use only $180,000 of Dawson’s initial deposit to buy Treasury bills for the joint account. (Tr. at 110.) As Carr explained: “[i]f she calls me and asks, I’ll tell her. I’m talking to an account holder, Peter Brooks.” *Id*.

Carr’s insistence that communication with one account owner was always sufficient led to the following colloquy between the ALJ and Carr:

> COURT: Even with the possibility someone is stealing one hundred thousand dollars out of her account, you don’t want to talk to [Dawson] because that would upset her?
>
> CARR: It’s not stealing it out of her account. It’s a joint account.
>
> COURT: I want you to know this isn’t coming off very well, Mr. Carr.

(Tr. at 122.)

account. (Tr. at 105-06.) Directing Carr's attention to Dawson's March 1994 letter enclosing the three additional $100,000 checks for deposit in Brooks's account, Carr's attorney asked him whether there was anything in the letter that had caused him concern. (Tr. at 543.) Answering no, Carr explained that the date of letter coincided with the joint account's highest net-liquidation value. *Id*.

During his testimony, the ALJ asked Carr what percentage of his customer accounts made profits in the futures or options market. Carr replied that "between 85 and 90 percent" lost money. He pointed out, however, that most of those accounts were "self-directed" rather than directly managed by him. (Tr. at 204.) The ALJ told Carr that he was getting the impression—based on Carr's testimony and his tape recorded telephone conversations with Dawson—that Carr "maybe . . . did not want Mrs. Dawson to know exactly what was going on in her account." (Tr. at 205.) When, at this juncture, Carr attempted to respond, the ALJ told him that he had "about two minutes now to try to change my mind." *Id*. Answering the ALJ, Carr conceded that, at some unspecified point in time, he approached Brooks and said, "Peter, [Sharon] doesn't know what's going on in this account." (Tr. at 206.) He did not contact Dawson, however, to discuss the matter with her. *Id*.

Lubow's Version

Lubow testified that he discussed potential trades for the joint account with both Brooks and Carr, but noted that he neither made trading decisions nor placed orders with Rodman & Renshaw. (Tr. at 25, 27.) He acknowledged filling out the order tickets that would be sent to Rodman & Renshaw based on instructions from Brooks or Carr. (Tr. at 28.) Additionally, at the direction of Brooks or Carr, Lubow supervised the relaying of

wire-transfer instructions to Rodman & Renshaw.[28] (Tr. at 59.) Lubow stressed that although he was in frequent telephone contact with Brooks, he never spoke with Dawson after they met in March 1993. (Tr. at 48, 57.)

Much of Lubow's testimony focused on the events leading to the opening of the joint account in March 1993 and the account's losses in May and June of 1994. To support his version of events, Lubow relied upon, and occasionally read directly from, notes that he had recorded during the time at issue.[29] (Tr. at 421.)

Reading from his notes, Lubow testified that he and Carr traveled to California to meet with Dawson in March 1993.[30] (Tr. at 443.) According to Lubow, after they arrived, he and Carr breakfasted with Brooks. (Tr. at 448.) Later that day, the three men had lunch with Dawson. (Tr. at 450.) Lubow said that at that time, Carr gave Dawson a "five or six minute" description of what a commodity option is and how options are traded. According to Lubow, as part of his presentation,

> [Carr] also talked about how if the market goes against us, we might lose money or there's a risk involved in selling options. As you know, essentially . . . that's how we like to do things, selling options. Hopefully they'll expire worthless, not

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[28] Lubow explained that he directed the transfer of funds from both the joint account and Brooks's individual account. (Tr. at 398-99.) According to Lubow, all wire transfers from the joint account were sent to Dawson's account at the Wells Fargo Bank. (Tr. at 398.) Wire transfers from Brooks's trading account went to the Great Western Bank in Santa Rosa, California, where Brooks maintained an individual account in his own name and a joint account with Dawson. (Tr. at 402.) Lubow could not recall which of those accounts received the funds transferred out of Brooks's account. (Tr. at 416.)

[29] Respondents introduced into evidence 27 pages of broker notes, containing almost 250 individual entries from as early as July 1989 (when Brooks first requested informational materials from Carr Investments) through April 1995. There are 42 blank lines corresponding to the period from March 1, 1994 until September 27, 1994. In the margins adjacent to the blank lines, there are several brackets and unexplained numbers. Lubow's testimony did not shed any light on the blank lines or the marks in the margin.

[30] In an entry dated February 10, 1993, Lubow noted that Brooks had "talked about his wife opening an account. He wants Ed and [me] to go out there and meet him, so we'll work on that." (Tr. at 441.) In another entry, dated February 17, 1993, Lubow wrote: "Spoke to Peter about positions. Spoke again on copper. We discussed coming out to meet up with [Brooks and Dawson]." (Tr. at 442.) Finally, in an entry dated February 26, 1993, Lubow reported that he had told Brooks that "we'll see him next week-end and we're looking forward to it." (Tr. at 442.)

> necessarily, and that's how we try to make money for our clients.

(Tr. at 451.) Lubow also testified that Dawson never indicated that she wanted to open an account with respondents for retirement purposes. *Id*. Finally, he said that during the lunch meeting with Dawson, there was no discussion of opening a Treasury bill account to generate interest and no mention of Carr's October 22, 1992 letter to Dawson. (Tr. at 452.)

According to Lubow, the next day Carr and Dawson met alone while he and Brooks played golf. (Tr. at 455.) Because he was not present, Lubow did not know what Carr and Dawson said to each other. (Tr. at 456.) Lubow recalled, however, that when he and Brooks returned to Dawson's condominium, he saw unsigned account opening documents lying on a table. (Tr. at 456-57.)

Turning to the joint account's losses the following year, Lubow testified that in May 1994, coffee prices, after having long remained stable, "decreased dramatically." (Tr. at 476.) Because the joint account had substantial short positions in coffee call options, this price movement caused it to suffer heavy losses. (Tr. at 477.) Lubow claimed that while these losses were taking place, Brooks never complained about respondents' handling of the joint account.[31] (Tr. at 478, 480.) He recalled, however, that at some point after the losses occurred, Brooks told him the joint account was supposed to have been a retirement account. (Tr. at 464.)

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[31] Lubow claimed that as coffee prices became increasingly unstable, the frequency of his telephone calls with Brooks increased to as many as five or six calls on May 19, 1994. According to Lubow, this was "the most that [Brooks] had ever talked to the office in one day for the life of the account." (Tr. at 471.)

V.

After the parties filed their posthearing submissions, the ALJ, acting on his own motion, decided to schedule a second oral hearing and reopen the record on the issue of damages. On December 15, 1998, he ordered the parties to produce an accounting of all funds deposited by Dawson into the joint account or Brooks's individual account.[32] The ALJ received each side's accounting into evidence at a hearing he conducted in Chicago on February 16, 1999.

During the hearing, respondents objected to Dawson's accounting because it relied on bank statements for Brooks's personal bank account at the Great Western Bank. They argued that the ALJ had repeatedly denied their requests to subpoena a complete set of banking records from the Wells Fargo and Great Western banks. In response, the ALJ ruled that the bank statements used by Dawson would not be placed in the evidentiary record over respondents' objection. Respondents declined to withdraw their objection because, in their view, the bank statements Dawson relied upon presented an incomplete picture of what happened to the transferred funds.[33] The ALJ then denied respondents'

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[32] The ALJ initially directed the parties to rely on the then existing record to show each disbursement; the name of the person who requested it; and the identity of the account (and name of the financial institution) where the disbursement was sent. In February 1999, he advised the parties that their accountings would be received into evidence as "corrected or modified versions" of previously admitted exhibits. In addition, he noted that if the parties obtained relevant Rodman & Renshaw records from the court overseeing the firm's bankruptcy proceeding, "the evidentiary record may be reopened to receive such documents." Finally, he afforded the parties an opportunity to file supplemental briefs and replies, presumably addressing issues raised by the corrected exhibits.

[33] For example, at the February 16, 1999 hearing, respondents claimed that Rodman & Renshaw records recently obtained from the firm's bankruptcy estate showed that the second-largest withdrawal made from Brooks's individual trading account during the period at issue "point[ed] back to Miss Dawson's account." Relying on Rodman & Renshaw transaction reports that they attached as an exhibit to their posthearing brief, respondents argued that a $3,000 withdrawal from Brooks's trading account on June 1, 1994, and a $10,000 withdrawal on October 27, 1994, were each wired to Dawson's Wells Fargo bank account. For both of these withdrawals, Dawson's accounting identified the recipient of the funds as "BANK ACCOUNT UNKNOWN." *See* Complainant's Exhibit 31.

renewed request that he subpoena all the material documents from the Great Western and Wells Fargo banks.

VI.

In April 1999, the ALJ issued his decision finding Carr, Lubow, and Carr Investments liable for violations of Section 4b(a) of the Act and Commission Rule 33.10. *Dawson v. Carr Investments, Inc.*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,616 (Apr. 27, 1999) ("I.D."). The ALJ focused his liability analysis on his conclusion that the record showed that Carr, Lubow, and Brooks "discussed with each other a scheme to induce Dawson to turn over the bulk of her inheritance to the likes of these respondents, and keep her in ignorance of what was about to happen in her account." I.D. at 47,952. In furtherance of the scheme, the ALJ concluded, Carr and Lubow "cooperated in transferring money from Dawson's account to [Brooks's] commodity account, and in depositing checks made payable to Dawson into [Brooks's] account." I.D. at 47,950. All the while, "with the help of Brooks, [they] deliberately and knowingly withheld vital information from Dawson." I.D. at 47,948. In the ALJ's view, "a major benefit" flowing from respondents' conduct was the $271,222.08 in commissions generated by trading in both the joint account and Brooks's individual account. I.D. at 47,950.

In reaching these conclusions, the ALJ determined that Carr and Lubow were not credible witnesses. I.D. at 47,947. Conversely, he relied on Dawson's testimony for many findings material to his analysis. For example, the ALJ found that Dawson first met Carr and Lubow "at about the same time she received Carr's letter in October 1992." *Id*. The ALJ also found that when Carr met with Dawson again in March 1993, he

"assured her that the letter of October 22, 1992 would be followed, and at no time discussed any risks associated with commodity trading." I.D. at 47,948.[34]

Again relying on Dawson's testimony, the ALJ found that when Dawson revoked the initial power of attorney she had executed, she "instructed Carr to keep her informed of events concerning her account." I.D. at 47,948. Similarly, he found that before sending Carr the four $100,000 checks deposited in Brooks's individual account, Dawson telephoned Carr and told him that the funds were to be used to buy additional Treasury bills for the joint account. I.D. at 47,949.[35]

The ALJ concluded that respondents' wrongdoing proximately caused Dawson $519,935.66 in damages. I.D. at 47,953. The ALJ did not rely on either side's accounting in reaching this conclusion.[36] He explained that his damage figure represented "the difference between the amount Dawson transmitted to respondent Rodman & Renshaw and the $171,800 Dawson withdrew from her account." I.D. at 47,950.[37] The ALJ also required respondents to pay costs and prejudgment interest dating from March 1993.

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[34] In this regard, the ALJ emphasized that Carr never disclosed that most of his customers, including Brooks, lost money. I.D. at 47,947-48.

[35] Because, in his view, Carr and Lubow "knew very well that the investment was Dawson's alone," the ALJ rejected respondents' legal argument that they had no duty to inform both Brooks and Dawson of what was happening in the joint account. I.D. at 47,953. The ALJ also rejected respondents' statute of limitations defense, summarily concluding that Dawson had "filed and perfected her claim well within the two-year statute of limitations." *Id*.

[36] The ALJ described respondents' accounting as a "worthless document," and criticized them for failing to "show with specificity who directed the entry of orders for disbursements, transfers, wires and checks, or the identity of the owner of any accounts receiving transfers, wires and checks." I.D. at 47,951. The ALJ emphasized that this information would have been available if respondents had complied with the recordkeeping requirements that Commission Rule 1.35 imposes on IBs. *Id*.

[37] Complainant's accounting indicated that Dawson withdrew $172,800 from the joint account, while respondents' accounting indicated that Dawson withdrew $176,300. *Compare* Complainant's Exhibit 31 *with* Respondents' Exhibit 18-A. The ALJ did not explain his determination that the actual amount Dawson withdrew was $171,800.

VII.

Respondents filed a timely notice of appeal and submitted a joint appeal brief in August 1999.[38] After receiving an extension of time necessitated by the death of her attorney, Dawson retained new counsel and filed an answering brief in November 1999.

Respondents' appeal brief raises challenges to the ALJ's procedural rulings, factual assessments, and substantive analysis. Respondents' substantive arguments focus on a myriad of the ALJ's factual assessments that they claim are not supported by the weight of the evidence.[39]

Respondents further argue that since Dawson established a joint account with her husband, Carr was under no obligation to keep her informed about the status of the account, but was free instead to communicate with Brooks alone. In the alternative, they claim that their failure to tell Dawson about the joint account's losses did not proximately cause her losses.[40]

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[38] In May 1999, respondents filed a motion to extend the time to file their appeal brief and to increase its length from the 35-page limit set forth in 17 C.F.R. § 12.401(d) to 85 pages. By delegated authority, we granted the requested extension of time and allowed respondents to file a brief not to exceed 50 pages. In denying their subsequent motion for reconsideration, we cautioned respondents that a 50-page brief would be "more than sufficient" to deal with matters raised by both the ALJ's I.D. and his previous rulings. *Dawson v. Carr Investments, Inc.*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,679 at 48,226 (CFTC Apr. 27, 1999).

[39] Respondents' factual challenges to the Initial Decision include claims that the weight of the evidence does not show that: (a) Carr misrepresented the nature of Dawson's investment or her risk of loss; (b) Dawson spoke with Carr before sending him the four $100,000 checks subsequently deposited in Brooks's account; or (c) Carr and Lubow were culpable participants in either the improper transfer of funds from the joint account to Brooks's account or the diversion of Dawson's four $100,000 checks into Brooks's account.

Furthermore, respondents contend that the ALJ prejudged material facts. In support of this claim, they cite to: (a) the ALJ's remark at the hearing that Carr had "about two minutes" to change the judge's mind and (b) the ALJ's reference in the Initial Decision to an extra-record affidavit that Brooks filed when he moved to dismiss his own reparations case.

[40] In addition, respondents argue that by requiring them to prepare an accounting, the ALJ improperly relieved Dawson of her burden of proof on damages.

Finally, respondents claim that the ALJ erred by allowing Dawson to add new claims to her complaint more than two years after the December 5, 1995 telephone call during which Carr told her that the joint account was worthless. In respondents' view, the substitute complaint that Dawson independently filed in July 1996 did not allege any violations arising from their role in the transfer of funds into Brooks's individual account either from the joint account or from Dawson's Wells Fargo bank account. Respondents contend that, as a consequence, Dawson was time barred from raising claims relating to those transfers in the amended complaint she filed in January 1998.[41]

Dawson's answering brief urges us to defer to the ALJ's factual and legal analyses, including his credibility determinations, and affirm his decision in all material respects.

DISCUSSION

I.

In recognition of a presiding officer's opportunity to assess demeanor-based factors in determining credibility, the Commission generally defers to his credibility determinations in the absence of clear error. *See Ricci v. Commonwealth Financial Group, Inc.* [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,917 at 44,444

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[41] Respondents seek to incorporate into their appeal brief arguments raised in two pleadings that they previously filed in this proceeding. The first is a 24-page application for interlocutory review of a ruling by the ALJ denying their motion for disqualification; the second is respondents' 25-page "Initial Brief in Support of Accounting," filed with the ALJ on March 26, 1999. Incorporation of a party's prior arguments by reference is a practice that "is not authorized by the Commission rules and, in effect, amounts to an evasion of the page limitation imposed by Commission Rule 12.401(d)." *McGough v. Bradford*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,265 at 50,600 n.25 (CFTC Sept. 28, 2000). Condoning this disfavored practice would be particularly egregious here, in light of our decision to allow the respondents to file a 50-page appeal brief. Accordingly, we have not treated the incorporated material as part of respondents' appeal brief.

We also deny respondents' separate motion to file a "list of errors" purportedly made in the Initial Decision. Respondents' motion does not explain why the purported errors could not have been addressed in their previously submitted appeal brief.

(CFTC Dec. 20, 1996). Indeed, we have noted that when the testimony of two or more witnesses is in conflict and a presiding officer finds one witness to be more truthful than any of the others, the circumstances are rare when that determination will amount to clear error. *Secrest v. Madda Trading Co.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,627 at 36,696 (CFTC Sept. 14, 1989).

On appeal, respondents do not directly suggest that the ALJ committed a clear error when he determined that Dawson's testimony was generally more credible than the testimony of Carr and Lubow. Our review of the record shows that the ALJ had a substantial basis for questioning the version of events offered by both Carr and Lubow.[42] In these circumstances, there is no basis for making an exception to our usual policy of deference.

Nevertheless, the Commission has consistently held that when the record includes other reliable evidence, factual findings cannot be based on one party's testimony simply because the presiding officer finds that party's testimony more believable than the testimony of an opposing party. *See, e.g. Sommerfeld v. Aiello*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,271 (CFTC Sept. 29, 2000). The presiding officer must independently evaluate the reliability of a witness's version of events "in

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[42] As noted above, respondents' answer to Dawson's January 1998 amended complaint claimed that Carr had discussed with both Brooks and Dawson his concern that Dawson's signature on the May 27, 1993 letter looked rubber-stamped. Carr verified the answer as true, but acknowledged at the hearing that he did not alert Dawson to the possible forgery because she had instructed him to communicate through Brooks. (Tr. at 122.) Moreover, the transcript of Carr's September 15, 1995 conversation with Brooks clearly demonstrates that Carr was willing to employ deception to protect his own interests.

Lubow's testimony relied heavily on the broker notes he recorded during the period at issue. He failed to offer any explanation, though, for a suspicious gap in the notes that happened to coincide with the six-month period when the joint account suffered substantial losses and when, according to Lubow's testimony, he and Brooks were in daily contact.

light of the record as a whole." *McDaniel v. Amervest Brokerage Services*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,264 at 50,589 (CFTC Sept. 26, 2000).

The ALJ's discussion of Dawson's testimony does not address reliability. While this might amount to a harmless error in other circumstances, respondents' appeal brief correctly notes that Dawson's version of the events at issue is plagued by unexplained discrepancies. For example, Dawson testified that she did not intend to share any of the funds that she deposited into the joint account with her husband. (Tr. at 243). On this point, Dawson's March 1998 discovery responses claimed that her June 25, 1993 letter to Rodman & Renshaw did not authorize the monthly transfers to Brooks's individual trading account when she signed it. Yet the substitute complaint filed by Dawson in July 1996 specifically referenced "the inter-account transfer of $10,000 per month" to her husband's account, and her discovery responses in December 1996 stated that she "may have authorized" monthly transfers to Brooks's account, but no longer possessed the written authorization. Dawson offers no explanation for her complete turnabout.

Similarly, Dawson's recollection of her communications with Carr about the submission of funds to Rodman & Renshaw changed substantially as this proceeding progressed. The substitute complaint filed by Dawson in July 1996 claimed that she discussed her initial $200,000 deposit with Carr in March 1993, before those funds were transmitted to Rodman & Renshaw. Dawson's amended complaint, filed in January 1998, alleged that she had discussions with Carr both before making her initial $200,000 deposit in March 1993 and before sending Carr an additional three $100,000 checks a year later, in March 1994. Dawson reiterated this claim in her March 1998 response to an interrogatory asking for information about her communications with them, as well as in

her subsequent testimony during the June 1998 hearing. At the hearing, however, Dawson testified about two additional conversations with Carr regarding her planned deposits—one prior to transmitting her $90,735.66 check in June 1993 and the other prior to transmitting her $100,000 check in January 1994. (Tr. at 250, 254). Dawson offers no explanation for this marked change in her recollection between the time of her response to respondents' written interrogatories in March 1998 and her testimony at the hearing three months later.

Dawson also testified that during her March 1994 conversation with Carr, he confirmed that as a result of her planned deposit of an additional $300,000 in the joint account, she "would have, altogether, six T-bills." (Tr. at 256.) The transcript of Dawson's December 5, 1995 telephone conversation with Carr, however, suggests that Brooks was the source of her apparent misunderstanding about the number of Treasury bills held in the joint account.[43]

As a general matter, in weighing discrepancies, we are mindful that even reliable witnesses can have lapses in memory about the details of events occurring years earlier. The discrepancies in Dawson's recollections, however, go the heart of her case and suggest a fundamental confusion about the events at issue. Moreover, Dawson remained resolute even in the face of documentary evidence flatly contradicting her memory.[44] Even the ALJ recognized this weakness, commenting that because "one's memory is

[43] In particular, the transcript indicates that during her conversation with Carr on December 5, 1995, Dawson protested that she had been told she had six $100,000 Treasury bills. In response, Carr asked, "By who? Peter?" Dawson replied, "Yes." We agree with respondents that if Carr had actually told Dawson that she owned six Treasury bills, she presumably would have said so in responding to his plainly worded question.

[44] At the hearing, Dawson insisted that her meeting with Carr in 1993 took place "between the last week of January and the beginning of February," a month before she signed the documents needed to open the joint account. (Tr. at 224.) In her posthearing brief, she continued to argue for the February date, despite respondents' production of hotel receipts establishing that they visited California on March 4 and 5, 1993.

sometimes fallible, it is possible that Dawson did not meet with Carr and Lubow until March 1993." I.D. at 47,947.

Thus, in our judgment, the record taken as a whole does not establish that Dawson's testimony is sufficiently reliable to support fact-finding that meets the weight of the evidence standard. We have recognized, however, that even if a complainant's testimony is deemed unreliable, other sufficient reliable evidence in the record can be used to establish the complainant's claims by the weight of the evidence. *McGough v. Bradford*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,265 (CFTC Sept. 28, 2000). In this instance, the documentary record establishes that respondent Carr fraudulently induced Dawson to open her commodities account.[45]

II.

As noted above, Carr's October 22, 1992 letter to Dawson indicated that his trading program could generate annual returns of between 18 and 23 percent through the sale of overvalued exchange-traded commodity options *and* the compounded growth of Treasury bills that would be purchased with Dawson's funds. The letter stated that if the projected returns were realized, Dawson would be able to withdraw at least $10,000 each month without depleting the proposed $1 million investment, but clearly acknowledged that the projected returns were not guaranteed.

The record demonstrates that substantial risks accompanied the potential benefits of Carr's trading system. Carr's letter, however, did not mention the risks associated with futures and options trading. Indeed, as Carr acknowledged in his testimony, his

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[45] The record does not show that respondent Lubow knowingly participated in any of the wrongdoing established on the record. Respondent Carr Investment's knowing participation is not at issue, because the company is derivatively liable for Carr's wrongdoing pursuant to Section 2(a)(1)(A) of the Act.

letter left the impression that if the projected trading profits were not achieved, the proposed account would "just stay status quo." (Tr. at 85.)

Moreover, Carr's letter explained the role that Treasury bills would play in the success of the proposed trading system—helping to "enhance our profit objective"— but failed to explain the cost that accompanied the highlighted benefit—exposure of the funds used to purchase Treasury bills, along with any interest they generated, to the vagaries of the futures market. As Dawson eventually learned, there was no firewall to protect her Treasury bills from the adverse consequences of unsuccessful futures and options trading.

Respondents emphasize Carr's claim that he orally disclosed the risk of his trading system when he met with Dawson in March 1993. They point to Carr's testimony that, at that time, he "met with [Dawson] at her condominium and explained the account opening documents in detail." As noted above, however, the record supports the ALJ's determination that Carr's testimony is not credible. Consequently, it is not reliable evidence that Dawson received an adequate disclosure of risk prior to opening the joint account.

Dawson does not dispute that before opening her account, she signed an acknowledgement indicating that she had received and understood the risk-disclosure statement set forth in Commission Rule 1.55. Carr's trading system focused on options, however, and the Rule 1.55 disclosure statement does not directly address the risks of trading options.

The record also shows that Dawson signed an acknowledgment that that she had received and reviewed a separate "Options on Futures Risk Disclosure Document"

prepared by Rodman & Renshaw. This document may have included language mandated by Commission Rule 33.7(b), which makes it clear that funds submitted for buying or selling exchange-traded commodity options are subject to a substantial risk of loss. In appropriate circumstances, Dawson's acknowledgement that she received a document including the mandated language could be persuasive evidence she was aware that funds submitted for option trading were subject to the risk of loss.

Respondents, however, have submitted no evidence that the options disclosure document that Dawson acknowledged included the language mandated by Rule 33.7(b).[46] Furthermore, even if it had included the language, the document would not have fully disclosed the risks posed by Carr's trading program. Carr's solicitation letter discussed both the sale of overvalued options and the purchase of Treasury bills, but did not discuss the relationship between the two investments. In light of the ambiguity created by Carr's letter, we cannot reliably conclude that review of the required options risk disclosure language would have made Dawson aware that any funds she submitted for the purchase of Treasury bills would be subject to the substantial risks of options trading. Without this knowledge, Dawson could not understand the full risks posed by Carr's trading program.

In these circumstances, the record establishes that Carr deceived Dawson by withholding material information about the risks of his proposed trading system. *Swickard v. A.G. Edwards & Sons*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,522 at 30,275 (CFTC Mar. 7, 1985) (disclosing less than the full truth regarding risk amounts to deception). The record also shows that Carr acted with

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[46] During the time at issue, Rule 33.7(a)(2) required Carr Investments, as the IB that introduced the joint account to Rodman & Renshaw, to keep a copy of the options risk disclosure statement that accompanied the acknowledgment signed by Dawson. Neither Carr Investments nor Rodman & Renshaw, however, included the options risk disclosure statement in any of their submissions to the record.

scienter.[47] Carr could hardly fail to notice that his October 22, 1992 letter did not include any reference to the risk that Dawson could actually lose her entire investment and more. In addition, the transcript of Carr's September 15, 1995 conversation with Brooks about the proposed release establishes that Carr was capable of disregarding Dawson's interests when it was convenient. On this basis, we find that, at best, Carr acted in reckless disregard of his duty to disclose material facts to Dawson.[48]

Because Carr's wrongdoing involved a failure to disclose material facts, there is a rebuttable presumption that Dawson would have relied on proper risk disclosures had they been given. *Nobrega v. Futures Trading Group, Inc.*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,267 at 50,617 (CFTC Sept. 29, 2000). To rebut this presumption, respondents must show the weight of the evidence establishes that Dawson would have been indifferent to the omitted information. *Sher v. Dean Witter Reynolds, Inc.*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,266 at 29,371 (CFTC June 13, 1984). In evaluating that showing, we bear in mind factors generally material to an analysis of reliance. *Bartel v. Prudential Bache Securities, Inc.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,278 at 35,221 (CFTC July 7, 1988) (citing

[47] Deception violates Section 4b(a) of the Act or Rule 33.10 only when the weight of the evidence shows that respondents acted intentionally or with reckless disregard for their duties under the Act. *Hammond v. Smith Barney Harris Upham & Co.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,617 at 36,658 (CFTC May 1, 1990) (scienter necessary for proof of a violation of Section 4b(a) of the Act); *In re Staryk*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,206 at 45,810 (CFTC Dec. 18, 1997) (scienter necessary for proof of a violation of Rule 33.10). A showing of mere negligence, mistake, or inadvertence does not establish requisite *scienter*. *Drexel Burnham Lambert Inc. v. CFTC*, 850 F.2d 742, 748 (D.C. Cir. 1988).

[48] On appeal, respondents disingenuously contend that Carr's letter "was not used by [Carr] to induce [Dawson] into opening the [joint] account." By its own terms, the letter embodied a proposal for establishing a systematic trading account with Carr Investments. Moreover, as the only written description of Carr's trading strategy ever given to Dawson, it clearly was intended to induce her to become one of the firm's customers.

Jakobsen v. Merrill Lynch, Pierce, Fenner & Smith, Inc., [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,812 at 31,392 (CFTC Nov. 21, 1985)).

These factors generally weigh in favor of Dawson. When Dawson inherited $1.2 million from her father in 1992, she was an unsophisticated investor, inexperienced in trading stocks, futures, or options. Nothing in the record suggests that Dawson had any propensity to invest her funds in risky ventures. Dawson's decision to grant Carr sole discretionary trading authority over the joint account after they met in person demonstrates the high degree of trust that she placed in him. In light of these characteristics, Dawson's hearing impairment, and the other written information made available to her,[49] there is no reliable basis for inferring that Dawson would have been indifferent to information disclosing the true risk of the trading program described in Carr's October 22, 1992 letter. Consequently, we find that Dawson would not have invested her funds in the trading program described in the letter if she had been aware of the true risks.[50]

III.

The other issues relating to the claim of fraudulent inducement primarily involve the proper calculation of Dawson's damages. As respondents emphasize in their appeal

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[49] The record shows that the October 22, 1992 letter was the only written description of Carr's proposed trading program provided to Dawson. In view of Dawson's hearing impairment, we infer that the deceptive letter continued to play a substantial role in her decision to entrust her inheritance to Carr during the five months that passed between the date of Carr's letter and the date when Dawson initially submitted funds to Rodman & Renshaw.

[50] Dawson's July 1996 complaint and the amended complaint she filed in January 1998 also alleged that Carr had fraudulently induced Dawson into opening a commodities account by falsely representing that all her funds would be invested in Treasury bills and that a portion of the accrued interest would then be used for futures and options trading. Apart from Dawson's unreliable testimony that such a representation was made, only Carr's October 1992 letter even remotely supports this claim. As discussed above, we regard the letter as ambiguous on the relationship between the funds used to purchase Treasury bills and the funds used to trade options. In view of that ambiguity, we cannot find that Carr's letter includes a knowing misrepresentation that Dawson's principal would only be used for the purchase of Treasury bills.

brief, Section 14(a) of the Act generally limits reparations awards to “actual damages proximately caused” by the violations established on the record. Because Dawson bears the burden of proof on proximate cause, she must show, by the weight of the evidence, that Carr’s fraudulent solicitation was a “substantial factor” in a loss that was a “reasonably probable consequence” of Carr’s unlawful conduct. *Modlin v. Cane*, [1999-2000 Tranfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,059 at 49,551 (CFTC March 15, 2000).

As noted above, the record supports a finding that Dawson would not have invested her funds in the trading program described in Carr’s October 22, 1992 letter to her, if she had been aware of its risks. Consequently, the starting point for calculating Dawson’s damages is the amount of funds that Dawson submitted to the joint trading account opened pursuant to Carr’ proposed program.

Quite clearly, this amount includes Dawson’s initial deposit of $200,000 in March 1993 and her subsequent deposit of $90,735.66 in June 1993. These funds were placed into the joint account and used to margin trades selected by Carr. The four $100,000 checks that Dawson mailed to Carr in January 1994 and March 1994, however, never reached the joint account. Instead, in accordance with Dawson’s written instructions, they were deposited into her husband’s individual account. As a result, this $400,000 was never used to fund Carr’s proposed trading program, nor was it subject to the program’s undisclosed risks.

At the hearing, Dawson testified that Brooks deceived her into depositing her $400,000 in his individual trading account. Given the discrepancies in Dawson’s testimony, however, and her failure to present any witnesses to bolster her claim that

Brooks wrongfully diverted her four $100,000 checks,[51] we cannot credit this testimony in the face of the assent evidenced by the signed documents. Even if we could, Dawson has not explained how Carr's failure to disclose the risks of his proposed trading program was a proximate cause of Brooks's subsequent efforts to wrongfully divert her funds.[52]

In light of this analysis, Dawson is entitled to the $290,735.66 that she subjected to the risks of Carr's proposed trading program, less any amounts Rodman & Renshaw returned to Dawson or paid to a third party in accordance with her instructions. As noted above, respondents argue that Rodman & Renshaw returned $176,300 from the joint account to Dawson, while Dawson claims she received $172,800. Our independent review of the record confirms that Rodman & Renshaw returned $172,800 to Dawson.[53]

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[51] Either Brooks or the unnamed attorney in whose office Brooks's confession of wrongdoing took place could have been called by Dawson to corroborate her testimony that Brooks admitted to converting her funds without her knowledge.

Despite Brooks's failure to appear as a witness, the ALJ took official notice of an affidavit Brooks filed in support of his application to dismiss his own reparations action, then pending before the ALJ. In particular, the ALJ noted that Brooks's affidavit included the following statement: "While Sharon Dawson's account was labeled as a joint account, in reality it was her individual account and each of the respondents knew it." I.D. at 47,951. Any reliance that the ALJ placed on Brooks's affidavit was clearly erroneous. *Boring v. Apache Trading Corp.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,380 at 39,280 (CFTC Aug. 27, 1992) (in a formal decisional proceeding "an ALJ abuses his discretion if, in the absence of special circumstances established on the record, he permits a party to substitute an affidavit (or a similar hearsay declaration) for oral testimony on material issues of fact.") Even if Brooks's affidavit had been properly admitted, it would have been of little value in proving that he wrongfully diverted Dawson's four $100,000 checks. Nowhere in the affidavit does Brooks admit that he tricked his wife into depositing her funds into his individual trading account instead of their joint account, or that she did so mistakenly.

[52] At best, the record suggests that, but for Carr's fraudulent inducement, Dawson never would have opened a commodities account with Rodman & Renshaw and that, but for the existence of that account, Brooks would not have had the opportunity to divert the four $100,000 checks that Dawson submitted to Rodman & Renshaw in 1994. A finding of "but for" causation alone, however, does not satisfy proximate cause. *SEC v. Murphy*, 626 F.2d 633, 650 (9th Cir. 1980). "As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability." W. Page Keeton, *et al*., *Prosser and Keeton on Torts* § 41, at 264 (5th ed. 1984).

[53] Two of the entries included in respondents' accounting are not shown on the monthly activity statements Rodman & Renshaw issued for the joint account. First, respondents' calculations reference a $2,000 check issued by Rodman & Renshaw on May 20, 1993, although payment on that check was stopped on May 26, 1993. Second, respondents reference a $4,900 wire transfer from the joint account on May 16, 1995. The May 1995 monthly activity statement indicates, however, that the wire transfer in question was only for $3,400. These two entries in the submission prepared by respondents appear to account for the $3,500

In addition to these withdrawals, Rodman & Renshaw transferred $75,500 from the joint account to Brooks's individual account in accordance with the June 25, 1993 letter signed by Dawson, which instructed the firm to transfer $10,000 between the accounts each month at Brooks's request. In her posthearing brief, Dawson argued that she never authorized the transfers, but was tricked into signing the June 25, 1993 letter by her husband. As explained above, we conclude that, because of the unexplained discrepancies in Dawson's recollections about this issue, her testimony that the monthly transfers were unauthorized is insufficiently reliable to support findings that meet the weight of the evidence standard. Consequently, we treat the monthly transfers that Rodman & Renshaw made to Brooks's individual account as authorized and deduct an additional $75,500 from the $290,735.66 that Dawson deposited in the joint account.

In light of these factual assessments, we calculate the damages proximately caused by Carr's fraudulent inducement by reducing the amount of Dawson's deposits ($290,735.66) by the amounts that Rodman & Renshaw returned to Dawson ($172,800) and transferred to Brooks's individual account ($75,500). On this basis, we award Dawson $42,435.66.[54]

IV.

Given the result of our proximate cause analysis, we must consider whether Dawson has established independent claims that justify the full measure of relief sought

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difference between their calculation of funds withdrawn from the joint account and the lower figure given by Dawson.

[54] We note that the ALJ's discovery ruling regarding records maintained by the Great Western and Wells Fargo banks deprived respondents of a fair opportunity to challenge Dawson's implicit claim that none of the funds belonging to her that were transferred or diverted into Brooks's individual trading account were later returned to Dawson's control. In these circumstances, if the record showed that Carr's fraudulent inducement played a substantial role in Dawson's loss of those funds, supplementary proceedings would be needed to establish a reliable basis for determining her actual damages. Since our damage award only encompasses Dawson's losses in the joint account, no supplemental proceedings are needed.

by her January 1998 amended complaint. As noted above, besides alleging fraudulent inducement, Dawson's amended complaint claimed that Carr breached a fiduciary duty by failing to tell her of his concern about the authenticity of her signature on the May 27, 1993 letter authorizing a one-time transfer of $100,000 from the joint account to Brooks's individual account. According to Dawson, if Carr had consulted with her about the suspicious letter, she would have realized that Brooks was trying to steal her assets and closed the joint account at once.

Our precedent acknowledges that "jointly owned accounts may raise difficult problems . . . when conflicts develop between the owners of the account." *Chapman v. E.F. Hutton & Co.,* [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,938 at 34,291 (CFTC Sept. 30, 1987). When an FCM or IB becomes aware that the interests of joint account holders are in conflict, it may not "resolve the conflict by favoring the interests of one joint account holder over the interests of the other." *Id*.

The weight of the evidence, however, does not establish that the May 27, 1993 letter put Carr on notice that Dawson's interests and Brooks's interests were in conflict. Dawson and Brooks had only opened the joint account a month earlier, and in her testimony, Dawson acknowledged telling Carr that she wanted her husband to serve as her "instrument of communication" with respondents. Moreover, although a customer's use of a signature stamp may be unusual, it is certainly not invariably a sign of fraud or unauthorized activity.[55] Consequently, the record does not support an inference that Carr's failure to consult Dawson about the May 27, 1993 letter amounted to a breach of fiduciary duty, as charged in the amended complaint.

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[55] Dawson has not come forward with any evidence showing that she did not maintain such a stamp or authorize Brooks to use it on her behalf.

The amended complaint alleged that Carr also breached a fiduciary duty by failing to notify Dawson when he received the three checks in March 1994 depositing $300,000 of Dawson's funds into Brooks's account. The linchpin of this claim is Dawson's testimony that she telephoned Carr before sending him the checks to tell him to deposit them in the joint account. As discussed above, because Dawson's testimony is insufficiently reliable to support findings under the weight of the evidence standard, the record does not establish that Carr was on notice of any conflict between Dawson's wishes and the message conveyed by Dawson's written instructions to him.[56]

In light of these factual assessments, we dismiss Dawson's claims alleging breach of fiduciary duty after the joint account was opened for a failure of proof.

V.

We also must address respondents' contention that the ALJ should be disqualified because of his "impermissible factual prejudgment" of the issues before him.[57] In support of this position, respondents cite to the colloquy that followed the completion of Carr's testimony during Dawson's case-in-chief:

> COURT: At this time, I'm skeptical that you really – I get the impression that maybe you were not happy; that you did not want Ms. Dawson to know exactly what was going on in her account. I base that on what you said here and on

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[56] At the hearing, Dawson did not introduce any evidence to corroborate her testimony that she called Carr in January 1994 and again in March 1994 prior to mailing her four $100,000 checks. The transcripts of the telephone conversations recorded by respondents between May 1995 and December 1995—detailing Carr's assistance to Brooks in covering up the loss of Dawson's funds—suggest that, at that point in time, Carr and Brooks were colluding to prevent Dawson from learning about the status of the joint account. These conversations are insufficient to support an inference that the collusion between the two men began more than a year earlier, before Dawson's four $100,000 checks were deposited into Brooks's individual trading account.

[57] Respondents raise a number of challenges related to the ALJ's decision to schedule a second hearing and reopen the record on the issue of damages. Because none of these challenges are material to our damage award, we do not specifically address them. We note, however, that Commission Rule 1.35 does not require IBs to prepare records evidencing the type of information that the ALJ required the parties to submit in their accountings.

this telephone conversation [*i.e.*, the December 5, 1995 telephone call between Dawson and Carr]. You want to tell me something –

CARR: Yeah. I do.

COURT: Don't interrupt me. I just thought you got about two minutes now to try and change my mind.

The Commission has held that disqualification of a presiding officer is appropriate when the record establishes that the presiding officer has either (1) a personal bias stemming from an extrajudicial source, or (2) a deep-seated favoritism or antagonism that would make a fair judgment impossible. *Kelly v. First Investors Group of the Palm Beaches, Inc.*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,753 (CFTC July 25, 1996). Because respondents do not claim that the ALJ's alleged bias arises from an extrajudicial source, we focus on the latter standard.

While the ALJ's remarks were somewhat intemperate, they do not support an inference that the judge harbored a deep-seated antagonism that would make fair judgment impossible. Our precedent recognizes that intemperate, impatient or inappropriate remarks are generally insufficient to warrant disqualification. *Ferriola v. Kearse-McNeill*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,172 at 50,153 (CFTC June 30, 2000). Instead, the record must demonstrate that the ALJ's unfavorable disposition toward the party or his case was wrongful or inappropriate, "either because it is undeserved, or because it rests upon knowledge that the [ALJ] ought not to possess . . . or because it is excessive in degree." *In re Mayer*, CFTC Docket No. 92-21, 1998 WL 80513 at *16 (CFTC Feb. 25, 1998). The comment cited by respondents falls well short of that showing.

VI.

Finally, we address respondents' argument that certain claims that Dawson included in her January 1998 amended complaint are time-barred under the Act's two-year statute of limitations. Section 14(a) of the Act provides that the two-year period commences when complainant's cause of action accrues, and Dawson concedes that her cause of action accrued on December 5, 1995. The complaint that Dawson submitted in July 1996 fell well within the two-year limitation period, but she did not submit her subsequent amendments until 1998, beyond the December 1997 deadline.

In order to amend a timely filed complaint more than two years after the cause of action has accrued, a complainant must demonstrate that the amendments "relate back" to the time of the original complaint. *Baldwin v. Cambridge Financial Corp.*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,928 at 48,957 (CFTC Nov. 24, 1999). In applying the relation-back doctrine, the Commission has looked for guidance to Rule 15(c) of the Federal Rules of Civil Procedure. *Id*. n.2 (citing *Bunch v. First Commodity Corp. of Boston*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,352 (CFTC Aug. 5, 1992)). That rule provides that an amended complaint relates back to the date of the original complaint when the claims asserted in it arise "out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." If Dawson can meet this standard, her amended complaint would have been filed within the statutory limitation. *Adams v. Jappell*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,293 at 46,338 (CFTC Mar. 18, 1998).

Under Rule 15(c)(2), an amended complaint relates back to the original as long as any claims based on new factual allegations "share a common core of operative facts"

with those alleged in the original complaint. *Martell v. Trilogy Limited*, 872 F.2d 322, 326 (9th Cir. 1989). If the original complaint describes "the general fact situation out of which the amendment arose" and there is an "overlap of evidence" between the new and the old claims, adequate notice is present. *De Malherbe v. International Union of Elevator Constructors*, 449 F.Supp. 1335, 1353 (N.D. Cal. 1978). In close cases, where there is some doubt as to whether a new claim should be barred, relation back should be liberally permitted, "especially if no disadvantage will accrue to the opposing party." *Rural Fire Protection Co. v. Hepp*, 366 F.2d 355, 362 (9th Cir. 1966).

Applying those considerations here, we find that the ALJ did not abuse his discretion by allowing Dawson to amend her complaint more than two years after her claims accrued. Both the July 1996 and January 1998 complaints arose out of respondents' solicitation of Dawson as a customer and their handling of the joint account that she established with her husband. In each complaint, Dawson contended that respondents committed solicitation fraud in violation of Section 4b(a) of the Act and breached their fiduciary duties to her. In partial support of these claims, the January 1998 amended complaint added two new factual allegations; *i.e.*, that Carr (1) failed to notify Dawson about the possible forgery of her signature on the May 27, 1993 letter authorizing the transfer of $100,000 from the joint account to Brooks's individual account and (2) failed to follow Dawson's purported instructions by allowing her three $100,000 checks to be deposited into her husband's account, rather than the joint account, in March 1994.

On their face, these amendments shared a common core of operative facts with the claims made in Dawson's July 1996 complaint. All of the wrongdoing alleged in

both complaints took place during the period between Dawson's initial solicitation by Carr and the collapse of the joint account in May 1994. Like the misconduct originally charged, the factual allegations added in the January 1998 amended complaint relate to conduct that arguably contributed to the ultimate loss of Dawson's funds. The same kinds of evidence (*e.g.*, account-opening documents, trading records, and testimony regarding communications between Dawson and respondents) would be used to substantiate the claims made in both the July 1996 and January 1998 complaints. Although we find that none of the additional theories of liability raised in Dawson's amended complaint were ultimately proven, the ALJ did not err in allowing her to present evidence in support of those theories.

CONCLUSION

In view of our analysis, we dismiss Dawson's claims against respondent Lubow for a failure of proof. We conclude that Carr and Carr Investments violated Section 4b(a) of the Act and Commission Rule 33.10 by fraudulently inducing Dawson to open a commodities account. We order them to pay Dawson a reparations award of $42,435.66, plus interest of 4.727 percent compounded annually from May 1, 1993, until the date of payment.[58] We dismiss the remainder of Dawson's claims against Carr and Carr Investments for a failure of proof.

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[58] Ordinarily, the Commission fixes prejudgment interest from the date on which the complainant sustained his or her loss. *Mintz v. Heinold Commodities, Inc.*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,707 at 30,997 (CFTC Aug. 22, 1985). Here, Carr fraudulently procured funds from Dawson on two separate dates, March 31, 1993 (when he received her initial investment of $200,000) and June 21, 1993 (when Dawson sent Carr an additional $90,735.66). Recognizing that any method used to calculate the starting date for accruing prejudgment interest is likely to be inexact, we have selected a starting date of May 1, 1993. With prejudgment interest accruing from that midpoint date, Dawson will receive fair compensation for the lost time value of her money.

The parties have advised us that Dawson has received two payments, totaling $108,000, from the estate of Rodman & Renshaw in connection with the settlement of a general unsecured claim she filed in the firm's bankruptcy proceeding. The stipulation and order entered by the bankruptcy court does not indicate the nature of Dawson's allegations against Rodman & Renshaw. In their motion to admit the stipulation into evidence in this proceeding, however, respondents stated that, on information and belief, "Dawson's claim in the Bankruptcy Proceeding alleged that Rodman . . . was liable for losses sustained by Dawson by virtue of [the] alleged wrongful diversions and transfers effected by Brooks from the joint account." Since our damage award of $42,435.66 does not encompass those losses, there is no need to offset it against any payments that Dawson has received, or subsequently may receive, in the Rodman & Renshaw

bankruptcy matter.

IT IS SO ORDERED.[59]

By the Commission (Acting Chairman NEWSOME and Commissioner HOLUM) (Commissioner ERICKSON concurring in part and dissenting in part).

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Jean A. Webb
Secretary of the Commission
Commodity Futures Trading Commission

Dated: April 10, 2002

Opinion of Commissioner Thomas J. Erickson,

Concurring in Part and Dissenting

Introduction

The essential facts of this case are not in dispute. Sharon Dawson was fraudulently induced to become a client of Carr Investments by Edward Carr. Over the course of this relationship, she entrusted hundreds of thousands of dollars to Carr. Money was made,

[59] Under Sections 6(c) and 14(e) of the Commodity Exchange Act (7 U.S.C. §§ 9 and 18(e) (1994)), a party may appeal a reparation order of the Commission to the United States Court of Appeals for only the circuit in which a hearing was held; if no hearing is held, the appeal may be filed in any circuit in which the appellee is located. The statute also states that such an appeal must be filed within 15 days after notice of the order, and that any appeal is not effective unless, within 30 days of the date of the Commission order, the appealing party files with the clerk of the court a bond equal to double the amount of the reparation award.

A party who receives a reparation award may sue to enforce the award if payment is not made within 15 days of the date the order is served by the Proceedings Clerk. Pursuant to Section 14(d) of the Act (7 U.S.C. 18(d) (1994)), such an action must be filed in United States District Court. *See also* 17 C.F.R. § 12.407 (2000).

Pursuant to Section 14(f) of the Act (7 U.S.C. § 18(f) (1994)), a party against whom a reparation award has been made must provide to the Commission, within 15 days of the expiration of the period for compliance with the award, satisfactory evidence that (1) an appeal had been taken to the United States Court of Appeals pursuant to Sections 6(c) and 14(e) of the Act or (2) payment had been made of the full amount of the award (or any agreed settlement thereof). If the Commission does not receive satisfactory evidence within the appropriate period, such party shall be suspended automatically. Such prohibition and suspension shall remain in effect until such party provides the Commission with satisfactory evidence that payment has been made of the full amount of the award plus interest thereon to the date of payment.

lost, and transferred in and out of Ms. Dawson's account. At the end of the day, and due in large part to Carr's fraudulent inducement and subsequent willingness to perpetuate the fraud, Dawson found herself between $500,000 and $700,000 in the hole. Carr, on the other hand, was unjustly enriched by more than $275,000 in commissions. The majority finds Carr liable for fraudulent inducement; I concur with this finding.

However, through a genuinely baffling analysis, the majority only sees its way clear to restore approximately $42,000 to Dawson – a fraction of the sum she entrusted to Carr. I respectfully dissent from this analysis and to the majority's failure to find that Carr breached his fiduciary duty to Dawson. Having found that Dawson was fraudulently induced, the majority ought to make more than a token effort to restore her to the status quo before her unfortunate encounter with Carr.

I would affirm the ALJ's finding of liability, remand the case for a more thorough accounting of the mishandled funds, and expect that a closer analysis would result in her recovery of something approaching the money she lost as a result of Carr's fraud. I also expect that this sum would approach the approximately $520,000 awarded by the ALJ.

Carr Breached His Fiduciary Duty To Dawson

At its core, Ms. Dawson's case alleges that Carr breached his fiduciary duty to her. I find it difficult to conclude otherwise, and nothing stands out more starkly than Carr's handling of a number of separate transactions that resulted in the transfer of $400,000 from Dawson to her husband, Peter Brooks.[60]

Within months of the opening of Dawson's joint account, in June 1993, Carr received a letter – purportedly from Dawson – authorizing the transfer of $100,000 from Dawson's trading account to Brooks's. The letter explained that the funds were to be deposited in Brooks's account to "partially repay" him for "financial and monitary assistance" (sic). Rodman and Renshaw, the FCM for the Dawson account, refused to transfer the funds, apparently because Dawson's signature on the letter appeared to be the result of a rubber stamp. Carr himself admitted that the signature did not "look kosher" and says that he suggested to Rodman and Renshaw that they ought to "get it notarized." The suspicious authorization was never honored and the funds were never transferred. Despite his

[60]As the discussion below indicates, there can be no doubt that Carr and Brooks worked together over the life of the account to separate Dawson from her money. However, the record suggests that Carr and Brooks formed a mutually beneficial confederation from the start. Carr, who had a previous relationship with Brooks, solicited Dawson at Brooks's suggestion. And, as mentioned above, Carr earned significant commissions for his handling of the account. Carr and Brooks further agreed to a referral arrangement under which Brooks would receive 1.5% for every new account dollar invested with Carr as a result of Brooks's efforts. Of course, this case is complicated somewhat by the fact that Brooks was the husband and joint account holder of Dawson. This does not change, however, the fact of the fraud perpetrated by Carr.

concern regarding the possibility of a forged signature, Carr never even attempted to contact Dawson.[61] Carr's conduct in this sequence alone indicates serious problems with his conception of his duty as a fiduciary. But there is more.

Some seven months later, in January 1994, Carr received a $100,000 check, drawn on Dawson's bank account, made payable to Dawson, endorsed in Dawson's handwriting, but with a typed instruction on the back of the check to deposit the check to a numbered trading account – Brooks's individual account. The check was covered by a typewritten letter apparently signed by Dawson and directing the funds to be deposited into an account identified only by its number. Again, the number belonged to Brooks's individual account. Over the next two and a half months, Carr received three more $100,000 checks, similarly endorsed, and covered with letters using nearly identical language to direct the deposit to Brooks's individual account.

In short, after having fraudulently induced Dawson to open an account, Carr claims that he recognized the possibility that Dawson was being manipulated with the first attempt to transfer $100,000 to Brooks's account. He did nothing. In fact, when presented with four subsequent $100,000 transfers, with no good reason for his suspicions to have been allayed, and having taken no initiative on his own to address those concerns, Carr saw to it that Brooks received the funds – all $400,000. Unlike the majority, I have no difficulty finding that a fiduciary fails to fulfill his duty to his client when he knowingly facilitates the fraudulent transfer of funds out of her account.[62] Nor do I think it unreasonable – as the majority apparently does – to expect an IB to make reasonable inquiry when he sees suspicious activity in a joint account. In this case, such inquiry reasonably would have been directed to Dawson, since it is her signature Carr suspected was forged.

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[61] The majority opinion cites Carr's explanation that Dawson "wanted everything to go to [co-accountholder] Peter [Brooks]." While the record does not clearly reflect the exact nature of Carr's concern with the Dawson signature, one can only conclude the he was concerned that the signature was not hers and therefore did not reflect her true intent as represented in the "authorization letter." Given this situation, the only acceptable reaction of a fiduciary would be to contact Dawson directly – something Carr declined to do.

[62]As discussed throughout this dissent, I believe that Carr was an active participant in the long-running fraud that emptied Dawson's joint account of hundreds of thousands of dollars. The majority does not appear to agree with me on this point. However, it would certainly have to agree, based on Carr's own admissions, that at the very least, Carr intentionally looked the other way when presented with evidence that his client was being defrauded. While no case law comments directly on the duty of IBs in such a situation, my view of Carr's duty comports with the general standards of conduct the Commission has expected of its other registrants. Simply put, commodity professionals are not allowed to blithely ignore fraud. *See Dill v. Sutton Ross Associates, Inc., et al.*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,696 at 30,968 (CFTC Aug. 22, 1985) (relying uncritically on fraudulent representations of a superior no defense to Section 4o liability); and *In re Slusser*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,701 at 48,313 (CFTC July 19, 1999) ("A commodity professional cannot discharge his or her fiduciary duty to investors by the 'uncritical repetition of information.'"). More generally, one of the most basic axioms of Commission law is the belief that "[i]t is essential that the highest ethical standards prevail in the futures industry." *In re Tipton*, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH), ¶ 20,673, at 22,752 (CFTC Sept. 22, 1978).

The Proper Measure for Fraudulent Inducement is Out-of-Pocket Losses

Fiduciary duty aside, even if I were to agree with the majority's liability analysis, I do not understand how the majority can find that Dawson was fraudulently induced to enter a relationship with Carr, and at the same time find that Carr was not liable to her for all lost funds she remitted to it. Typically, the remedy for fraud in the inducement is out-of-pocket losses. As the Commission has held in the past, a "[c]omplainant is entitled to recover those funds that were submitted to the account as a result of the inducement." *Goodrich v. GNP Commodities, Inc.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,358 at 35,525 (CFTC Nov. 21, 1988).

Nevertheless, the majority declines to consider as losses some $400,000 remitted to Carr by Dawson and wrongfully diverted into Brooks's account. According to the majority, "Dawson has not explained how Carr's failure to disclose the risks of his proposed trading program was a proximate cause of Brooks's subsequent efforts to wrongfully divert her funds." It seems evident to me that Carr's fraudulent inducement of Dawson and his willing assistance in Brooks's manipulation of his wife had everything to do with the loss of Dawson's money, including the $400,000 that Carr helped divert to Brooks's account.

The majority does not see it this way, arguing that while Carr's fraudulent inducement may have been a "but for" cause of Dawson's losses, it was not a proximate cause. See majority opinion citing *SEC v. Murphy*, 626 F.2d 633, 650 (9th Cir. 1980). I agree neither with the majority's analysis of the authority on which it relies, nor with its characterization of Carr's role in the loss of Dawson's funds.[63] In the past, the Commission has not hesitated to impose liability upon the party responsible for the fraudulent inducement, even where they were not directly involved in the subsequent loss of the funds invested. *See Schwalbach v. United States Investment Co.*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,641 at 30,722 (CFTC July 2, 1985)(respondent AP held liable for the entire extent of a customer's loss when AP had fraudulently induced customer to invest and funds invested were later misappropriated by

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[63] The *Murphy* case involved the offer and sale of unregistered securities. In that context, the Ninth Circuit stated that "a finding of 'but for' causation, alone, does not satisfy proximate cause…." *Murphy*, 626 F.2d at 650. The court illustrated its point with the example of a printer who must perform certain "mechanical acts" in order for a security to be issued; while such a person might meet a "but for" causation test, he could not be seen as the seller of the security. *Id.* In this context, the court held that in order to be considered the proximate cause of a sale, one's acts must be a "substantial factor in bring about the transaction. Thus, a defendant will be held liable … if his acts were both necessary to and a substantial factor in the sales transaction." *Id.*

Surely the majority would agree that Carr's fraudulent inducement of Dawson amounts to much more than the 'mechanical acts' of a blameless printer of securities documents. Moreover, even applying the *Murphy* standard, there can be little doubt that Carr's fraudulent inducement and cavalier (at the very least) handling of the Dawson account were both a necessary and substantial factors in Dawson's loss of all funds, whether through trading or through diversion to accounts controlled by Brooks.

officer of the FCM). In *Schwalbach*, the Commission held that "[o]nce complainant parted with his funds in reliance on [the AP's] misrepresentations, the misrepresentations would not be any less causative of the loss of those funds where the funds are thereafter misappropriated by the company than if the funds were actually invested in the commodity markets and lost." *Id.* Thus, even if I were to agree with the majority – that Carr's only liability flowed from fraudulent inducement – I would nonetheless have no difficulty holding Carr liable for all of Ms. Dawson's losses.

The ALJ's Credibility Findings Were Not Clearly Erroneous

As the majority notes, this case involves difficult facts and is full of contradictory – sometimes even internally inconsistent – testimony. However, the ALJ explicitly recognized inconsistencies in both respondents' and complainant's testimony and untangled this snarl by doing what triers of fact are expected to do: he examined the evidence presented, he evaluated the credibility of the parties offering the evidence, and, on balance, he found Dawson to be a more credible witness than Carr or Jonathan Lubow. Were the ALJ's credibility findings clearly erroneous? Not in my opinion.[64]

To be sure, there are inconsistencies in Ms. Dawson's testimony, and the majority certainly takes pains to point out these inconsistencies. But the ALJ seems to have taken them into account and weighed them against other factors – factors that were given little weight by the majority. For example, what is to be made of the fact that Carr never contacted Dawson about his suspicions regarding the validity of the authorization to transfer the first $100,000 from Dawson's joint account to Brooks's? What is to be made of the fact that while Dawson's joint account lost hundreds of thousands of dollars in value over the course of a few months, Carr never bothered to personally inform Dawson of the account's status? What is to be made of the fact that only when Dawson contacted Carr did Carr inform his client that the account was all but worthless?

Carr would have us believe that he was following his clients' orders by dealing exclusively with Brooks and not with Dawson. Carr's self-serving account is not even consistent with his other testimony. Carr concedes, for example, that he spoke with Dawson on various occasions throughout the life of the account. Certainly, he might have taken advantage of one of these conversations to let Dawson know that her account was withering. Moreover, any IB with a sense of duty to his client would have found a way to tell her that he suspected her account was being manipulated with forged documents. It is plain, however, that Carr intentionally kept Dawson in the dark regarding the status of her account.

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[64] As I have said in the past, the Commission ought to adhere more closely to its own precedent, which requires that it defer to its ALJs' credibility findings in all but the most extraordinary cases. See *Modlin v. Cane*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶28059 at 49,554 (CFTC Mar. 15, 2000)(Erickson dissenting).

Moreover, I am struck by the fact that Carr managed to keep Dawson in the dark, not just by refusing to keep her informed when he had a duty to do so, but also by actively advancing the deception. Again, by way of example, throughout the time Dawson maintained a trading account with Carr, Carr forwarded funds to Dawson from the trading account on a monthly basis. This was an arrangement set up by Dawson and apparently was based on the assumption that the account had a positive income stream. As of September 1995, Dawson's trading account had suffered such great losses that it no longer had enough money in it to cover the monthly allotment coming due. Carr never told Dawson this, and Brooks apparently covered the shortfall by withdrawing $3,500 from his own trading account with Carr.

In order to cover the next monthly allotment – and to continue keeping Dawson in the dark about the losses – Carr agreed to loan Brooks $3,000, sending him a check by overnight mail. At the same time, Carr tried to extract a release from Brooks that would have covered "any and all claims" relating to all activity in accounts maintained by Carr for Brooks and Dawson. Most tellingly, Carr told Brooks that he should sign *both* on his own behalf *and on Dawson's as well*. Thus, Carr intentionally deceived Dawson about the status of her account and gave Brooks money to continue the cover-up while simultaneously trying to limit his own liability by leveraging a release from Brooks.

I discuss these facts in some detail – and there are others[65] – to emphasize two points. First, they demonstrate that the ALJ's credibility findings are eminently justified: Carr has absolutely no credibility. Second, despite the battering that Dawson's credibility takes in the majority opinion, her version of events is largely born out by the facts; Carr's deceit was consistent, continuing and instrumental in her staggering losses.

For all the reasons discussed above, I would affirm the ALJ's finding of liability and remand the case for a more thorough accounting of the mishandled funds. There is the suggestion that some funds may have flowed through Brooks and back to Dawson, and this should be sorted out with a more careful review of banking records. However, I am certain that even under a more rigorous analysis, Dawson would be entitled to a recovery more closely aligned with the money she mistakenly entrusted to Carr.

________________________________ April 1, 2002_________

Commissioner Thomas J. Erickson Date

[65] Among the other facts I find most compelling are Lubow's missing broker's notes that correspond with the several months that Dawson's account suffered its most significant loss. How can any credit be given to Lubow's testimony – which was largely based on those portions of his notes he did preserve – when crucial portions of those notes are obliterated and no explanation is given?